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No. 02-1643

In the Supreme Court of the United States

GARY EBECK, PETITIONER

v.

BILL HEDRICK, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the remedy provided by 28 U.S.C. 2255 is "inadequate or ineffective," so that a federal prisoner may file a petition for a writ of habeas corpus under 28 U.S.C. 2241, when the prisoner's claim of "actual innocence" is based on a claim—that his offense was not committed in the territorial jurisdiction of the United States—that was available but not made when he filed his first Section 2255 motion.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Bailey v. *United States*, 516 U.S. 137 (1995)	5, 10
Bousley v. *United States*, 523 U.S. 614 (1998)	7
Braden v. *30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973)	9
Calcano-Martinez v. *INS*, 533 U.S. 348 (2001)	12
Charles v. *Chandler*, 180 F.3d 753 (6th Cir. 1999)	10
Davenport, In re, 147 F.3d 605 (7th Cir. 1998)	10, 11
Dorsainvil, In re, 119 F.3d 245 (3d Cir. 1997)	10, 11
Ebeck v. *United States*, No. 98-3459, 1999 WL 1144828 (8th Cir. Nov. 23, 1999)	6
Felker v. *Turpin*, 518 U.S. 651 (1996)	8
INS v. *St. Cyr*, 533 U.S. 289 (2001)	12, 13
Ivy v. *Pontesso*, 328 F.3d 1057 (9th Cir. 2003)	11
Jones v. *United States*, 529 U.S. 848 (2000)	11
Jones, In re, 226 F.3d 328 (4th Cir. 2000)	10
Lorentsen v. *Hood*, 223 F.3d 950 (9th Cir. 2000)	10
Martin v. *Perez*, 319 F.3d 799 (6th Cir. 2003)	11, 12
Triestman v. *United States*, 124 F.3d 361 (2d Cir. 1997)	10
United States v. *Barrett*, 178 F.3d 34 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000)	10, 11
United States v. *Ebeck*, No. 94-1905, 1994 WL 419792 (8th Cir. Aug. 12, 1994)	4
United States v. *Hayman*, 342 U.S. 205 (1952)	8-9

Cases—Continued: Page

Wofford v. *Scott*, 177 F.3d 1236 (11th Cir. 1999) 11

Constitution, statutes, rules and regulation:

U.S. Const. Amend. V (Double Jeopardy Clause) 5
8 U.S.C. 1252(a)(2)(C) 12, 13
18 U.S.C. 844(i) 12
18 U.S.C. 924(c)(1)(A) 2, 4, 10
18 U.S.C. 1201(a) 2, 8
18 U.S.C. 1201(a)(2) 3, 7
18 U.S.C. 1201(c) 4
21 U.S.C. 846 4
21 U.S.C. 853 4
28 U.S.C. 2241 ..... 2, 5, 8
28 U.S.C. 2241(c)(3) 8
28 U.S.C. 2244(b)(3) 5
28 U.S.C. 2255 ..... 2, 5, 6, 8, 9. 13
40 U.S.C. 255 7
Fed. R. Civ. P. 60(b) 2, 6
Fed. R. Crim. P. 35(b) 5
United States Sentencing Guidelines § 3B1.1(c) 4

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OPINION BELOW

The order of the court of appeals (Pet. App. 1A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 2002. A petition for rehearing was denied on December 10, 2002 (Pet. App. 13A). On February 27, 2003, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including May 9, 2003, and the petition was filed on May 8, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a guilty plea in the United States District Court for the Western District of Missouri, petitioner was convicted of kidnapping within the territorial jurisdiction of the United States (18 U.S.C. 1201(a)) and using and carrying a firearm during and in relation to a crime of violence (18 U.S.C. 924(c)(1)(A)). The district court imposed a sentence of 300 months' imprisonment, which was later reduced to 240 months. The court of appeals affirmed.

Petitioner filed two motions under 28 U.S.C. 2255, which were denied, and a petition for a writ of habeas corpus under 28 U.S.C. 2241, which was treated as a motion under Section 2255 and denied. Petitioner subsequently filed a motion under Federal Rule of Civil Procedure 60(b), which the district court treated as a Section 2255 motion and denied. The court of appeals affirmed.

Petitioner then filed a petition for a writ of habeas corpus under Section 2241. The district court treated the motion as a Section 2255 motion, dismissed it, and denied petitioner's application for a certificate of appealability. The court of appeals also denied petitioner's application for a certificate of appealability, and dismissed his appeal.

1. Petitioner was the leader of an organization that committed burglaries and robberies in Missouri and other States in the late 1980s and early 1990s. PSR ¶¶ 17, 83-104. The members of the group used methamphetamine, which their supplier obtained from Mitchell Courtney. PSR ¶¶ 18-19. On July 20, 1993, petitioner and three other members of his organization —Donald Rogers, Jeffrey Foster, and Jary Swope— agreed to steal drugs and money from Courtney and to

force him to reveal the identity and location of his supplier. PSR ¶ 20. Petitioner, Rogers, and Foster then entered Courtney's house and waited for him to return. *Ibid.* When Courtney came home shortly after midnight, petitioner and the others interrogated him at gunpoint until he revealed that his methamphetamine supplier was Larry Johnson and told them where Johnson could be found. PSR ¶¶ 21-22. After stealing methamphetamine and cash from Courtney, the men agreed that Swope would keep him locked in the trunk of his car in a wooded area of petitioner's property while petitioner and the others went to find Johnson. *Ibid.*

Armed with two semiautomatic pistols and a shotgun they had stolen from Courtney, petitioner, Rogers, and Foster drove in Swope's van to the United States Army Corps of Engineers campground near Kimberling City, Missouri. PSR ¶ 24. The men found Johnson outside his camper and forced him into the van at gunpoint. PSR ¶ 25. When a campground worker approached the van, petitioner drove several blocks and ordered Johnson to get out of the van with Rogers and Foster. *Ibid.* Petitioner was arrested later that day when he returned to the campground to try to retrieve money and drugs from Johnson's camper. PSR ¶ 28.

2. On August 5, 1993, petitioner was charged in an indictment in the Western District of Missouri with Rogers, Foster, and Swope. Count 1 (8/5/93 Indict. 1-2) charged petitioner with kidnapping Johnson "on lands acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, and within the territorial jurisdiction of the United States," in violation of 18 U.S.C. 1201(a)(2). That provision prohibits kidnapping "within the special maritime and territorial jurisdiction of the United States."

Count 3 (8/5/93 Indict. 2-6) charged petitioner with conspiracy to commit kidnapping within the territorial jurisdiction of the United States, in violation of 18 U.S.C. 1201(c). Counts 2 and 4 (8/5/93 Indict. 2, 6) charged him with using and carrying firearms during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A). On October 8, 1993, petitioner was charged in a separate indictment with one count of conspiracy to distribute methamphetamine, in violation of 21 U.S.C. 846, and one count of criminal forfeiture under 21 U.S.C. 853. 10/8/93 Sup. Indict. 1-3.

On January 5, 1994, petitioner pleaded guilty to Counts 1 and 2 of the August indictment. In exchange for his plea, the government agreed to dismiss Counts 3 and 4 of that indictment and both counts of the October indictment. 1/5/94 Tr. 2-3. In his plea agreement, petitioner admitted that he had participated in the kidnapping of Johnson in order to steal drugs and drug proceeds. Plea Bargain Agreement 1-3. At the change-of-plea hearing, petitioner acknowledged that he had "assist[ed] in kidnapping Larry Johnson" and that the kidnapping occurred "on property under the control of the Corps of Engineers." 1/5/94 Tr. 13-14. The district court accepted petitioner's plea. *Id.* at 15.

On March 29, 1994, petitioner was sentenced to 240 months' imprisonment on Count 1 and a consecutive 60-month prison term on Count 2. 98-3459 Gov't C.A. Br. 1. The court of appeals rejected petitioner's claim that the district court had clearly erred in finding that he was an organizer or leader of criminal activity, see Sentencing Guidelines § 3B1.1(c), and affirmed his sentence. *United States* v. *Ebeck*, No. 94-1905, 1994 WL 419792 (8th Cir. Aug. 12, 1994) (unpublished opinion). On November 28, 1995, on the basis of his cooperation

with law enforcement authorities, petitioner's sentence on Count 1 was reduced to 180 months' imprisonment under Federal Rule of Criminal Procedure 35(b). 98-3459 Gov't C.A. Br. 1-2.

3. On June 12, 1996, petitioner filed a motion under 28 U.S.C. 2255. In the motion, he claimed that his conviction violated the Double Jeopardy Clause, because he had previously been subjected to civil forfeiture proceedings; that his sentence was improperly calculated, because the district court had failed to determine the type of methamphetamine involved; that his Section 924(c) conviction violated *Bailey* v. *United States*, 516 U.S. 137 (1995), because he had not personally used or carried a firearm; and that he received ineffective assistance of counsel, because his attorney had an actual conflict of interest. 98-3459 C.A. App. 88-130. The district court rejected each of these claims and denied the motion. *Id.* at 189-192. The court of appeals denied petitioner's application for a certificate of appealability. 98- 3459 Gov't C.A. Br. 2.

On April 4, 1997, petitioner filed a second Section 2255 motion, in which he claimed that the district court lacked subject matter jurisdiction over the prosecution of the kidnapping offense, because the campground where the offense occurred was not within the territorial jurisdiction of the United States. 98-3459 C.A. App. 220-291. The district court (*id.* at 423-424) denied the motion, because petitioner had not obtained authorization from the court of appeals to file a successive motion for collateral relief. See 28 U.S.C. 2244(b)(3), 2255 para. 8. The district court also denied petitioner's application for a certificate of appealability, as did the court of appeals. 98-3459 Gov't C.A. Br. 3.

On March 9, 1998, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the Central

District of Illinois, where he was then incarcerated. In the petition, he claimed that he was actually innocent of the charges to which he pleaded guilty. The district court treated the petition as a motion under Section 2255 and transferred it to the United States District Court for the Western District of Missouri, which denied relief. 98-3459 Gov't C.A. Br. 4.

On May 29, 1998, petitioner filed a motion under Federal Rule of Civil Procedure 60(b) in which he requested that the order denying his second Section 2255 motion be vacated. 98-3459 C.A. App. 458-499. In his motion, petitioner again claimed that the district court lacked subject matter jurisdiction over the kidnapping charge. *Ibid.* The district court treated petitioner's Rule 60(b) motion as a successive motion under 28 U.S.C. 2255 and denied it, because petitioner had not received the requisite authorization from the court of appeals. 98-3459 C.A. App. 515-517. The court of appeals affirmed, agreeing with the district court that "[a] Rule 60(b) motion seeking relief from the denial of a § 2255 motion and raising claims of a postconviction relief nature * * * should be construed as a successive § 2255 motion." *Ebeck* v. *United States*, No. 98-3459, 1999 WL 1144828, at *1 (8th Cir. Nov. 23, 1999) (unpublished opinion).

4. On April 2, 2001, petitioner filed a petition for a writ of habeas corpus under Section 2241 in the Western District of Missouri, where he was then incarcerated. He claimed that he was actually innocent of the kidnapping charge, because the property on which the crime occurred was not within the jurisdiction of the United States. Pet. for Writ of Habeas Corpus 1-2. Petitioner also claimed that he was entitled to relief under Section 2241, because the restrictions on successive motions precluded him from raising his jurisdic-

tional claim in a Section 2255 motion, which consequently provided an inadequate or ineffective remedy. *Id.* at 1. In its response, the government conceded that, although the "kidnapping occurred on land owned by the United States, * * * the site of the crime was not under the 'territorial jurisdiction of the United States' within the meaning of 18 U.S.C. § 1201(a)(2)." Resp. to Pet. Rep. Suggestions in Support of His Pet. 1. The basis for the concession was that, while "ownership of the land conferred proprietary jurisdiction, the statutorily prescribed steps to obtain 'legislative' jurisdiction were not taken." *Ibid.* (citing 40 U.S.C. 255). Relying on this Court's decision in *Bousley* v. *United States*, 523 U.S. 614, 623-624 (1998), however, the government argued that petitioner was not entitled to relief based on his claim of actual innocence, because he could not show that he was actually innocent of the charges that were dismissed in exchange for his guilty plea. Resp. to Pet. Rep. Suggestions in Support of His Pet. 3-6.

The magistrate judge to whom the petition was referred recommended that it be dismissed. Pet. App. 2A-8A. Noting that petitioner had "admitted when he entered his guilty plea that he was guilty of kidnapping," the magistrate judge found that petitioner had failed to "state a claim of factual innocence of the charges to which he pled," and that petitioner's actual innocence claim was "based on mere legal insufficiency." *Id.* at 7A. Because petitioner could not show that he was entitled to proceed under Section 2241, the magistrate judge concluded, his "claim should be construed as a successive petition under § 2255" and dismissed. *Id.* at 5A.

The district court adopted the magistrate judge's report and recommendation, and dismissed the petition. Pet. App. 9A-11A. The court agreed that petitioner

had not "stated a claim of factual innocence" and that his petition was "nothing more than a successive petition under § 2255, which must be dismissed." *Id.* at 11A. The district court denied petitioner's application for a certificate of appealability, finding that he had "failed to make a substantial showing of the denial of a constitutional right." *Id.* at 12A.

In a one-paragraph summary order, the court of appeals denied petitioner's application for a certificate of appealability and dismissed his appeal. Pet. App. 1A.

ARGUMENT

Petitioner contends (Pet. 15-27) that he is "factually innocent" of the kidnapping offense, because the crime was not committed within the territorial jurisdiction of the United States, as required by 18 U.S.C. 1201(a). He contends (Pet. 15-27) that a motion under 28 U.S.C. 2255 provides an "inadequate or ineffective" remedy, because he is prohibited from raising his jurisdictional claim in a successive Section 2255 motion, and that he should therefore have been permitted to seek relief under 28 U.S.C. 2241. The district court correctly treated petitioner's petition as a successive motion under Section 2255; the court of appeals correctly denied petitioner's application for a certificate of appealability; and the court of appeals' unpublished summary order does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. Under Section 2241, federal courts may issue writs of habeas corpus to federal or state prisoners who are "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. 2241(c)(3). See *Felker* v. *Turpin*, 518 U.S. 651, 659-660 & nn.1-2 (1996); *United States* v. *Hayman*, 342 U.S. 205, 211-212

& n.11 (1952). A habeas corpus petition must be filed in the district with jurisdiction over the defendant's custodian, which is typically the jurisdiction where the defendant is imprisoned. See *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 494-495 (1973). Because a federal prisoner may be incarcerated far from the district in which he was convicted and sentenced, habeas corpus petitions filed by federal inmates can create serious administrative difficulties. See *Hayman*, 342 U.S. at 213-214 & n.18.

In 1948, Congress responded to these concerns by enacting 28 U.S.C. 2255. See *Hayman*, 342 U.S. at 219. Section 2255 allows a federal prisoner to obtain collateral review of his conviction and sentence by filing a motion (rather than a habeas corpus petition) in the district where he was convicted and sentenced. 28 U.S.C. 2255 para. 1. Section 2255 replaces the habeas corpus remedy in most cases, providing that

> [a]n application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section[] shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. 2255 para. 5. A habeas corpus petition challenging a federal prisoner's conviction can thus be brought under Section 2241 only if the prisoner can establish that Section 2255 is "inadequate or ineffective."

As numerous courts have recognized, Section 2255 is not "inadequate or ineffective" simply because relief

has already been denied under that provision, because a prisoner is procedurally barred from pursuing such relief, or because a prisoner has been denied permission to file a second or successive Section 2255 motion. See *Charles* v. *Chandler*, 180 F.3d 753, 756 (6th Cir. 1999) (per curiam) (collecting cases). Such a rule would "nullify," *In re Davenport*, 147 F.3d 605, 608 (7th Cir. 1998), and render "meaningless," *United States* v. *Barrett*, 178 F.3d 34, 50 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000), the limitations that Congress has placed on collateral review of federal convictions.

At the same time, several courts of appeals have concluded that a prisoner may file a petition under Section 2241 when the limits on successive Section 2255 motions would otherwise deny him a forum for asserting a claim of actual innocence of "using" a firearm under 18 U.S.C. 924(c)(1)(A), based on this Court's interpretation of "use" in *Bailey* v. *United States*, 516 U.S. 137, 150 (1995). See *In re Jones*, 226 F.3d 328, 332-334 (4th Cir. 2000); *Davenport*, 147 F.3d at 610-612; *Triestman* v. *United States*, 124 F.3d 361, 376-378 (2d Cir. 1997); *In re Dorsainvil*, 119 F.3d 245, 248-252 (3d Cir. 1997). These courts have reasoned that a narrow exception to the exclusivity of Section 2255 is warranted for a federal prisoner whose claim of factual innocence was not available when his initial Section 2255 motion was filed, and who thus "never has had 'an unobstructed procedural shot' at presenting [the] claim of innocence." *Lorentsen* v. *Hood*, 223 F.3d 950, 954 (9th Cir. 2000) (quoting *Davenport*, 147 F.3d at 609). See, *e.g.*, *Davenport*, 147 F.3d at 611 ("A federal prisoner should be permitted to seek habeas corpus only if he had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction or sentence because the law changed after his first 2255 motion.");

Dorsainvil, 119 F.3d at 251 (Section 2241 petition may be filed by "a prisoner who had no earlier opportunity to challenge his conviction for a crime that an intervening change in substantive law may negate").

Petitioner's claim of actual innocence, however, is not based on a previously unavailable judicial decision. His claim that the site of the kidnapping was not within the territorial jurisdiction of the United States has been available to him since the indictment was returned, and could have been raised before his guilty plea, on direct appeal, or in his first Section 2255 motion. As the Eleventh Circuit has explained,

> With virtually all claims—*Bailey* is a rare exception —a petitioner will have had an "unobstructed procedural shot at getting his sentence vacated." That does not mean that he took the shot, or even that he or his attorney recognized the shot was there for the taking. All [that is] require[d] * * * is that the procedural opportunity have existed.

Wofford v. *Scott*, 177 F.3d 1236, 1244 (11th Cir. 1999) (quoting *Davenport*, 147 F.3d at 609); accord *Ivy* v. *Pontesso*, 328 F.3d 1057, 1060 (9th Cir. 2003) ("[I]t is not enough that the petitioner is presently barred from raising his claim of innocence by motion under § 2255. He must never have had the opportunity to raise it by motion."); *Barrett*, 178 F.3d at 53 ("[W]here a prisoner had an opportunity to present his claim properly in his first § 2255 petition, but failed to do so, any 'ineffectiveness' of his current § 2255 petition is due to him and not to § 2255.").

2. The absence of any intervening judicial decision distinguishes this case from *Martin* v. *Perez*, 319 F.3d 799 (6th Cir. 2003), a case on which petitioner relies (Pet. 16-18). In that case, the Sixth Circuit held that a

prisoner who was barred from raising in a successive Section 2255 motion an actual innocence claim under *Jones* v. *United States*, 529 U.S. 848 (2000), was entitled to seek relief under Section 2241. *Jones* was an intervening decision that held that arson of an owner-occupied residence not used for commercial purposes is not subject to federal prosecution under 18 U.S.C. 844(i), and the petitioner in *Martin* had had no opportunity to raise his *Jones* claim under Section 2255, because *Jones* was decided after he filed his first Section 2255 motion. See 319 F.3d at 805. Petitioner, in contrast, did have an earlier opportunity to raise his claim of innocence. The claim was available based on public records (Pet. 13-14, 20) and could have been raised in a first motion under Section 2255 (or even earlier). His belated discovery of his claim based on the legal status of the land on which the kidnapping occurred does not allow him to resort to Section 2241.

Petitioner's reliance (Pet. 18-19, 24-27) on *INS* v. *St. Cyr*, 533 U.S. 289 (2001), and *Calcano-Martinez* v. *INS*, 533 U.S. 348 (2001), is also misplaced. In those cases, this Court considered the effect on the availability of habeas corpus relief of 8 U.S.C. 1252(a)(2)(C), which provides that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed [certain offenses]." The Court held that district courts retain jurisdiction under Section 2241 to review aliens' challenges to removal orders that involve pure questions of law. See *Calcano-Martinez*, 533 U.S. at 351-352; *St. Cyr*, 533 U.S. at 298-314. In so holding, the Court relied on the absence of another judicial forum to consider such challenges, "coupled with the lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas of

such an important question of law." *St. Cyr*, 533 U.S. at 314. In this case, by contrast, petitioner could have raised his jurisdictional claim in his first Section 2255 motion, and thus was not deprived of an opportunity to obtain judicial review. Unlike 8 U.S.C. 1252, moreover, Section 2255 specifically provides that a federal prisoner may not seek habeas corpus relief under Section 2241 unless "the remedy by [Section 2255] motion is inadequate or ineffective." 28 U.S.C. 2255 para. 5.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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